BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY D. SCOTT Claimant	)	
VS.	)	
HI TECH INTERIORS, INC. Respondent	)	Docket No. 1,047,245
AND	)	
CINCINNATI CASUALTY COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 15, 2010, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Bruce Alan Brumley of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a series of accidental injuries with a date of accident of August 28, 2009, that arose out of and in the course of his employment. The ALJ found that written claim was timely. The ALJ, however, did not order any preliminary benefits or compensation.[1]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 14, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

[1] Also on January 15, 2010, the ALJ issued a separate Order Referring Claimant for Independent Medical Evaluation wherein Dr. Pat Do was asked "to render an opinion regarding whether claimant's need for treatment in his left shoulder was caused, aggravated or accelerated by a series of accidental injuries beginning on 12/29/08."

ISSUES

Respondent requests review of whether claimant sustained personal injury by accident that arose out of and in the course of his employment. Respondent further requests review of whether claimant suffered a series of accidents or a single traumatic accident. Last, respondent argues that claimant did not provide it with timely written claim.

Claimant asserts that he sustained personal injury by accident that arose out of and in the course of his employment and that he provided respondent with timely written claim.

The issues for the Board's review are:

(1) Did claimant sustain personal injury by an accident or a series of accidents that arose out of and in the course of his employment?

(2) If so, did claimant provide respondent with timely written claim?

FINDINGS OF FACT

Claimant works for respondent as the foreman of a crew. In his job, he is required to lift studs; carry pieces of sheet rock, sometimes overhead; and install ceiling grid and ceiling tile, which is all overhead work. Claimant had worked for respondent for four or five years before his accident on December 29, 2008.

On December 29, 2008, claimant was hit in the head by a 150-pound beam. Immediately after claimant was hit, he felt pain in his neck and right shoulder. He was taken to the hospital that day, and he followed up with Dr. Laurie Conway, his personal physician, on January 2, 2009. On January 8, 2009, claimant was seen by Dr. Dale Garrett, at which time he was released to return to work with some temporary restrictions as to his right shoulder. On January 23, 2009, Dr. Garrett released claimant from treatment and closed his case. Claimant is not having trouble with his right shoulder. After the accident, he had some swelling in his right shoulder, but the swelling went away. Other than one physical therapy session, claimant has had no further treatment for his neck or right shoulder.

When giving his history to Dr. Garrett, claimant said he had a history of chronic shoulder pain for several years and that he had been taking Ultram about once a week for left shoulder pain. Claimant testified that about 13 years ago, while working for another employer, he set down a bundle of studs and his left shoulder popped. Claimant received an injection, and the pain lessened. About a year later, he received another injection. After that, he has continued to have intermittent pain in his left shoulder, which he described as a 2 to 3 on a 0 to 10 scale. Dr. Garrett looked at claimant's left shoulder and told him he thought he had a labral tear.

In February 2006, claimant was seen by Dr. Conway because he was having some chest pains. While there, claimant told Dr. Conway that his left shoulder was hurting, and he requested a prednisone shot. He returned to Dr. Conway's office in September 2006, complaining of left shoulder pain and asking for a refill of his Tylenol with codeine. He also asked about getting an injection in his shoulder. Dr. Conway referred claimant to an orthopedist. Claimant testified he was seen by Dr. Gilbert, who ordered an MRI of his left shoulder. Claimant said that the MRI did not show anything structurally wrong with his left shoulder, and Dr. Gilbert told him he thought he had arthritis.

Claimant saw Dr. Conway on June 13, 2008, at which time he complained of constant pain in his left shoulder. Dr. Conway's note indicates that claimant "is having pretty excruciating left shoulder pain."[2] Claimant rated the pain in his left shoulder at that time as a 6 and described the pain as constant. Claimant also complained of right shoulder pain that was a 3-4, and he described the pain as intermittent.[3]

Claimant was seen in Dr. Conway's office on December 19, 2008, 10 days before his accident. He was seen by Darrin Cox, a physician's assistant. Claimant was requesting a refill of Tylenol 4, which he was taking for break-through pain on weekends. Mr. Cox's note indicates that claimant had worn his left shoulder out and surgery was the only intervention. The evaluation done on claimant's left shoulder on December 19, 2008, showed that he had severe crepitation and popping when the shoulder was rotated.

Claimant testified that in February or March 2009, his left shoulder pain starting getting worse. He described the pain as a 4 or 5 on a 0 to 10 scale. His pain worsened, especially with overhead work. On July 17, 2009, claimant saw Mr. Cox about the problems with his left shoulder. Mr. Cox's notes state:

> He said recently he went to the Work Comp doctor [Garrett] on his right shoulder and they talked to him about his left shoulder. They think he may have a tear in his left shoulder. He said this happened about 13 years ago for another employer and he was wanting to know how he could go and back [*sic*] on Workman's Comp. I told him I was not for sure if 13 years ago, there might [be] a statute of limitations on that but what he needed to do is get ahold of Workman's Comp people and describe what happened . . . .[4]

Claimant recalled this conversation with Mr. Cox. He said at the time he was trying to figure out where the left shoulder problem came from because the first time he ever heard of a tear was from Dr. Garrett in January 2009. Previously he had been told he had arthritis. Mr. Cox referred claimant to Dr. Neal Lintecum. At the initial examination on August 5,

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[2] P.H. Trans., Resp. Ex. A at 5.

[3] *Id.* at 7.

[4] P.H. Trans., Resp. Ex. A at 12.

2009, claimant gave Dr. Lintecum a history of an accident 13 years earlier and said he has had intermittent pain since. He said after his accident in December 2008, the pain in his left shoulder has increased. Dr. Lintecum ordered an MRI, and the results showed that claimant had a complex posterior labral tear with extension to the biceps anchor. After receiving the results of the MRI, Dr. Lintecum recommended that claimant have surgery. He believed claimant's current left shoulder problems were the result of the December 2008 accident. There is no evidence in the record that Dr. Lintecum communicated this to claimant in writing.

After reviewing Dr. Conway's notes on claimant, which were provided to him by respondent's attorney, Dr. Lintecum opined that there is no scientific way to determine exactly which of claimant's symptoms were related to either accident. He refused to give a definitive opinion as to causation but stated: "[I]t does seem to have been a longstanding chronic problem for him."[5]

Claimant filed an Application for Hearing on September 1, 2009, claiming back, neck and bilateral shoulder injuries caused by an accidental injury on or about December 29, 2008, and a series of accidents running through his last day of work. The parties stipulated that August 29, 2009, was the first day written notice was provided to respondent.[6] The parties also stipulated that the last payment respondent made on this claim was July 17, 2009.

Claimant saw Dr. Zimmerman on October 5, 2009, at the request of claimant's attorney. Claimant told Dr. Zimmerman about the December 2008 accident where a 150-pound beam struck his neck and right shoulder. Dr. Zimmerman's report states that claimant said "when this accident occurred . . . he jerked away in an attempt to lessen the impact. He reported in jerking at the time of impact that he sustained further injury affecting the left shoulder."[7] Claimant apparently did not give that history to Drs. Garrett, Conway or Lintecum. Respondent's attorney asked claimant if he jerked his left shoulder when the beam fell on him, and claimant replied, "I may have. I mean, I don't have any idea."[8] Dr. Zimmerman recommended surgery for claimant's left shoulder pain. He gave no opinion on causation.

Claimant was seen on December 23, 2009, by Dr. Erich Lingenfelter for an evaluation of his right shoulder. However, it appears his examination was of claimant's left shoulder. Dr. Lingenfelter said that the MRI showing claimant's alleged labral tear was of

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[5] P.H. Trans., Resp. Ex. D at 1.

[6] P.H. Trans. at 4.

[7] P.H. Trans., Cl. Ex. 2 at 5.

[8] P.H. Trans. at 40.

inferior quality. He said claimant needed to have a good quality MRI which would include an MRI arthrogram to assess whether claimant really had a labral tear. He was of the opinion that claimant had arthritis that preexisted the accident. He acknowledged that claimant could have a labral injury as well as arthritis, but he did not have a good MRI to truly evaluate this.[9]

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

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[9] In his brief to the Board filed March 15, 2010, claimant's attorney references the independent medical examination (IME) report of Dr. Pat Do, which was filed with the Division on March 5, 2010. This IME report was not before the ALJ at the time of his Order and is not properly a part of the record on appeal.

[10] K.S.A. 2009 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

K.S.A. 2009 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[13] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[14] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[15]

In *Bergstrom*,[16] the Kansas Supreme Court stated:

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[12] *Id.* at 278.

[13] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[14] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[15] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[16] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[18]

ANALYSIS

Claimant suffered injuries at work on December 29, 2008, when he was struck by a falling beam. Claimant's symptoms were primarily in his neck and right shoulder. Claimant did not notice symptoms in his left shoulder until weeks later. Claimant mostly attributes his left shoulder symptoms to performing his normal job duties, including carrying sheet rock and overhead work. However, claimant believes he may have also strained his left shoulder when the beam fell on him.

Claimant has had prior left shoulder problems and received treatment for left shoulder complaints before December 29, 2008. He does not contend that his left

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[17] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[18] K.S.A. 2009 Supp. 44-555c(k).

shoulder injury is all attributable to his work with respondent, but he does contend that his work with respondent aggravated his preexisting condition. Claimant describes his left shoulder symptoms as worsening after December 29, 2008. This Board Member, like the ALJ, finds claimant's testimony to be credible in this regard and affirms the ALJ's conclusion that claimant suffered a series of accidents each working day with respondent.

Claimant has not been taken off work or restricted by the authorized physician from performing the work which is the cause of claimant's left shoulder condition. Therefore, pursuant to K.S.A. 2009 Supp. 44-508(d), the date of accident for the series is the earliest of either the date claimant gave respondent written notice of the injury or the date the condition is diagnosed as work related and that fact is communicated in writing to claimant. The record does not reflect that any physician notified claimant in writing that his left shoulder injury was work related. Although Dr. Lintecum seems to have diagnosed claimant's left shoulder injury as work related, the record does not show that this was communicated to claimant in writing, and not before claimant gave written notice. The parties have stipulated that claimant gave respondent written notice of the injury on August 29, 2009. This Board Member finds August 29, 2009, is the date of accident for the series of accidents to claimant's left shoulder.

The parties have further agreed that the letter from claimant's attorney dated August 28, 2009, which respondent received on August 29, 2009, constituted a written claim for compensation. Obviously, given the finding that August 29, 2009, is the date of accident for the series, then written claim was timely made within 200 days of the date of accident.

CONCLUSION

(1) Claimant sustained personal injury to his left shoulder by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Based upon an accident date of August 29, 2009, claimant's written claim for compensation was timely served upon the employer.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated January 15, 2010, is modified to find the date of accident was August 29, 2009, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge